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8
9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **OAKLAND DIVISION**
12

13 FREE KICK MASTER, LLC, and FREE KICK
MASTER JUNIOR, LLC,

14 Plaintiffs,

15 v.

16 APPLE INC., et al.,

17 Defendants.
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Case No. 4:15-cv-03403-PJH

**NOTICE OF MOTION, MOTION, AND
MEMORANDUM IN SUPPORT OF
DEFENDANT APPLE INC.'S RULE
12(b)(6) MOTION TO DISMISS
PLAINTIFFS' THIRD AMENDED
COMPLAINT**

Date: January 13, 2016
Time: 9:00 a.m.
Judge: Hon. Phyllis J. Hamilton
Courtroom 3, 3rd Floor

NOTICE OF MOTION AND RELIEF REQUESTED

PLEASE TAKE NOTICE that on January 13, 2016 at 9:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable Phyllis J. Hamilton, Chief Judge of the United States District Court, Northern District of California, 1301 Clay Street, Oakland, California 94612, in Courtroom 3, 3rd Floor, the Court will hear argument on Defendant Apple Inc.'s ("Apple") Motion to Dismiss the Third Amended Complaint of Plaintiffs Free Kick Master, LLC ("FKM") and Free Kick Master Junior, LLC ("FKM Jr.") (collectively, "plaintiffs"). Apple's Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities in Support, attached exhibits, any additional briefing, and any additional material that may be elicited at the hearing of this Motion.

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Apple requests that the Court dismiss Plaintiff's Third Amended Complaint with prejudice for failure to state a claim upon which relief can be granted.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Notwithstanding three chances to amend the complaint and clear direction from the Court regarding the necessary allegations, plaintiffs' Third Amended Complaint ("TAC") fails to state a claim against Apple and should be dismissed with prejudice. Five of the six claims in the TAC are identical to claims the Court previously dismissed with prejudice as to other defendants. First, Counts I and II are substantively identical to the dismissed direct infringement and false designation of origin claims against codefendants Google, Inc. ("Google") and Amazon.com, Inc. ("Amazon"). ECF No. 86 at 5, 13. As with those dismissed claims, the claims against Apple are deficiently premised on alleged use of plaintiffs' mark by third-party developers rather than by Apple. Second, plaintiffs' state law claims against Apple (Counts IV through VI) are similarly indistinguishable from claims the Court dismissed with prejudice as barred by Section 230 of the Communications Decency Act, 47 U.S.C. § 230 ("CDA").

The remaining claim for contributory infringement (Count III) is also deficient: the Court properly instructed plaintiff that it must allege a defendant either (1) intentionally induced another to infringe a trademark or (2) continued to supply a product or service knowing that the recipient was using it to engage in trademark infringement. ECF No. 86 at 9-10. Despite this clear direction, the TAC does not allege that Apple intentionally induced third-party developers to infringe plaintiffs' marks, nor does it plausibly allege that Apple knew that third-party apps were infringing but continued to allow the apps to remain available in Apple's App Store.

Furthermore, new evidence attached to the TAC establishes that *all* of plaintiffs' claims are time-barred: the entirety of the TAC concerns alleged wrongdoing known to plaintiffs since at least March 2011. Plaintiffs, however, delayed over four years before commencing suit, and that delay bars all of the claims. As discussed further below, the Court should dismiss all claims against Apple with prejudice.¹

¹ Plaintiffs' filing of the TAC supersedes the Second Amended Complaint ("SAC"). *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 925–28 (9th Cir. 2012). But even if the Court were to consider the SAC to be the operative pleading against Apple, it should be dismissed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure for the same reasons specified herein, because "[a]nalysis

II. BACKGROUND

A. Plaintiffs' Allegations

FKM claims to be the owner, through a series of assignments, of a federal trademark registration for the mark FREE-KICK MASTER for the following services:

Production and distribution of television shows and sports movies; production of radio and television programs, namely sports programs production; television production; television show production; motion picture film production; organization of sports events in the field of football; organizing sporting events, namely football games, American football, soccer, hockey and rugby competitions

TAC ¶¶ 1, 12-16. TAC Ex. I (ECF No. 89-1). Plaintiffs allege that “[a] FREE KICK MASTER event was held on July 6, 2008 in Reliant Stadium in Houston Texas,” TAC ¶ 24, but they do not allege that plaintiffs organized this event or otherwise used the mark in commerce.

Apple designs, develops, and sells consumer electronics, consumer software, and online services. Its consumer products include the iPhone® mobile digital device. Its online services include the App Store, an online store allowing users to obtain applications (“apps”) developed by third-party developers (as well as a select few apps developed by Apple) for use on iPhones and other Apple devices. Defendants Amazon and Google operate online stores similar to the App Store that allow users to obtain software and games for non-Apple mobile devices. ECF No. 17 at 2-3.

Plaintiffs contend that a “Free Kick Master” game developed by a *third-party developer* infringes their trademark rights, and they contend that this game has been available in Defendants’ online stores, including Apple’s App Store, since 2011. TAC ¶ 35. Plaintiffs allege that this app has been “advertised by *third parties*” and is similar to the format and rules of the FREE KICK MASTER event that allegedly occurred in 2008. *Id.* ¶ 36 (emphasis added).

Plaintiffs contend that third-party developers used “Apple Software” to develop apps to be playable on Apple devices. *Id.* ¶ 38. Plaintiffs allege that because Apple requires apps to meet certain guidelines to be included in the App Store, Apple “should have known, had every reason

under Rule 12(c) is ‘substantially identical’ to analysis under Rule 12(b)(6).” *Pit River Tribe v. Bureau of Land Mgmt.*, 793 F.3d 1147, 1155 (9th Cir. 2015).

1 to know, and every opportunity to know that it was helping develop, certifying, and marketing
 2 infringing products.” *Id.* ¶ 46. Plaintiffs also contend that Apple “ignored communications from
 3 Plaintiffs’ agents.” *Id.*

4 **B. Procedural History**

5 Plaintiff FKM commenced this action against Apple, Amazon, Google, and Samsung on
 6 April 15, 2015 in the Northern District of Ohio. ECF No. 1. Defendants moved to transfer the
 7 action to the Northern District of California, or, in the alternative, dismiss the action for failure to
 8 state a claim. ECF Nos. 16, 17, 29. On July 21, 2015, the Northern District of Ohio granted these
 9 motions and transferred the case. ECF No. 40. On August 6, 2015, the Court granted FKM’s
 10 unopposed motion to file a Second Amended Complaint. ECF No. 57. Amazon, Google, and
 11 Samsung then moved to dismiss the SAC for failure to state a claim for relief. ECF Nos. 63, 66.

12 On October 19, 2015, the Court granted those motions. ECF No. 86. It dismissed FKM’s
 13 direct infringement claims against Google, Amazon, and Samsung with prejudice, holding that
 14 the SAC alleged no facts showing that the defendants “used” FKM’s mark or that “use” created a
 15 likelihood of confusion. *Id.* at 9, 14. It dismissed FKM’s state law claims against Google and
 16 Amazon with prejudice, holding that they were barred by § 230 of the CDA. *Id.* at 10-11. It
 17 dismissed FKM’s contributory infringement claims with leave to amend. *Id.* at 13-14.

18 On November 16, 2015, plaintiffs filed a TAC. The TAC adds FKM Jr. as a plaintiff and
 19 pleads six claims against Apple: (1) federal trademark infringement; (2) federal false designation
 20 of origin; (3) federal contributory trademark infringement; (4) state common law trademark
 21 infringement; (5) violation of California Bus. & Prof. Code § 17200; and (6) violation of
 22 California Bus. & Prof. Code § 17500. TAC ¶¶ 47-87.²

23
 24
 25
 26 ² Although plaintiffs allege that FKM Jr. owns U.S. Trademark Registration No. 3,433,938 for a
 27 design mark featuring the words “Free Kick Master Junior,” plaintiffs do not allege that they have
 28 ever used this mark in commerce, nor do they allege use of it by Apple or by any third-party
 developers. TAC ¶¶ 19, 29, 33-87. The adding of FKM Jr. as a plaintiff, therefore, is without
 effect.

1 **III. ARGUMENT**

2 **A. Plaintiffs Fail To Allege Direct Infringement**

3 As the Court explained in its October 19, 2015 Order, to establish a claim of direct
 4 trademark infringement against Apple, plaintiffs must show that (1) they own a valid, protectable
 5 trademark, and (2) Apple's use of the mark in commerce is likely to cause confusion. ECF No. 86
 6 at 5 (*citing Applied Info. Scis. Corp. v. eBay, Inc.*, 511 F.3d 966, 969 (9th Cir. 2007)). The Court
 7 granted codefendants' motions to dismiss the direct infringement claims in FKM's SAC on the
 8 grounds that they contained "no allegation in the SAC that the defendants themselves used the
 9 'Free Kick Master' mark in commerce." ECF No. 86 at 5, 13. The Court held that these claims
 10 could "only be interpreted as claims of contributory infringement," as they were premised on the
 11 availability of certain games in codefendants' online stores that were developed by *third-party*
 12 *developers* rather than by codefendants. *Id.* Although FKM requested leave from the Court to
 13 amend its direct infringement claims to include "more specific" allegations, *see* Sept. 30, 2015
 14 Hearing Tr. at 40:1-16, the Court rejected this request, dismissing them with prejudice. ECF No.
 15 86 at 14-15.

16 Although the TAC does not assert direct infringement claims against Google, Amazon, or
 17 Samsung, plaintiffs continue to assert such claims against Apple. TAC ¶¶ 47-55 (Counts I & II).
 18 Those claims are factually indistinguishable from the direct infringement claims the Court
 19 dismissed with prejudice in its October 19, 2015 Order: they are premised on apps that plaintiffs
 20 allege were developed by "third party developers," not Apple. *Id.* ¶ 58. Plaintiffs contend that
 21 Apple should be liable for these third-party apps because (a) they were allegedly available for
 22 download in Apple's App Store, and (b) Apple promulgates and enforces quality standards for
 23 apps available via its App Store and provides "Apple Software" that third-party developers use to
 24 develop apps for Apple devices. *Id.* ¶¶ 34-46. The Court has already held that such allegations do
 25 not support a direct infringement claim and "can only be interpreted as claims of contributory
 26 infringement." ECF No. 86 at 5. Accordingly, Counts I, II, and IV should be dismissed with
 27
 28

1 prejudice.³

2 **B. CDA § 230 Bars Plaintiffs’ State Law Claims**

3 As the Court explained in its October 19, 2015 Order (*see* ECF No. 86 at 6-7), the CDA
 4 promotes the continued development of the internet and other interactive computer services and
 5 provides that “[n]o provider or user of an interactive computer service shall be treated as the
 6 publisher or speaker of any information provided by another information content provider.”
 7 47 U.S.C § 230(c)(1). It “immunizes providers of interactive computer services against liability
 8 arising from content created by third parties.” *Fair Hous. Council of San Fernando Valley v.*
 9 *Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc); *Perfect 10, Inc. v. CCBill*
 10 *LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119,
 11 1122 (9th Cir. 2003).

12 The TAC includes no allegations that Apple acted as an author of the accused apps.
 13 Rather, plaintiffs seemingly contend that Apple contributed to the apps because it has content
 14 guidelines and rules for applications available on the App Store, enforces those rules, and
 15 provides technical assistance to developers. TAC ¶¶ 38-46. This is insufficient, as the Court noted
 16 in its October 19, 2015 Order: “So long as a third party willingly provides the essential published
 17 content, the interactive service provider receives full immunity regardless of the editing or
 18 selection process.” ECF No. 86 at 10 (quoting *Carafano*, 339 F.3d at 1124). Plaintiffs fail to
 19 make any allegations that Apple “acted as an author of the challenged content”—*e.g.*, that it
 20 “chose the names of the products, wrote any of the code, or provided encouragement or assistance
 21 in the allegedly infringing use of plaintiff’s mark on the products.” ECF No. 86 at 11.
 22 Accordingly, the Court should dismiss plaintiffs’ state law claims (Counts IV through VI) with
 23 prejudice.

24 **C. Plaintiffs’ Contributory Trademark Infringement Claim Fails**

25 As the Court explained in its October 19 Order (*see* ECF No. 86 at 9-10), to hold a
 26 defendant liable for actions of an alleged third-party infringer, plaintiffs must allege that the

27 ³ Although, as discussed below, Count IV should be dismissed pursuant to CDA § 230, that claim
 28 also fails to adequately allege direct infringement. TAC ¶¶ 63-69 (Count IV).

1 “defendant (1) intentionally induce[d] another to infringe on a trademark or (2) continue[d] to
 2 supply a product knowing that the recipient [wa]s using the product to engage in trademark
 3 infringement.” *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996); *see also*
 4 *Louis Vuitton Malletier v. Akanoc Solutions, Inc.*, 658 F.3d 936, 942 (9th Cir. 2011); *Perfect 10,*
 5 *Inc. v. Visa Int’l Serv. , Ass’n*, 494 F.3d 788, 806 (9th Cir. 2007). And to survive a motion to
 6 dismiss, plaintiffs must support these allegations with “factual content that allows the court to
 7 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v.*
 8 *Iqbal*, 556 U.S. 662, 678 (2009). Despite the Court’s clear direction, the TAC alleges no facts
 9 showing that Apple intentionally induced third-party developers to infringe plaintiffs’ marks. Nor
 10 does it allege facts supporting the plausible inference that Apple knew that third-party developers’
 11 were infringing plaintiffs’ mark.

12 Plaintiffs fleetingly allege that Apple “ignored communications from Plaintiffs’ agents,”
 13 TAC ¶ 46, but they fail to support this claim with sufficient facts. Tellingly, plaintiffs do not
 14 allege to have provided Apple with pre-suit notice via a cease-and-desist letter. Nor do plaintiffs
 15 allege that they contacted Apple via Apple’s website, which provides a simple online form for
 16 submitting claims of alleged infringement for content available on the App Store.⁴ Rather,
 17 plaintiffs attempt to “support” this allegation with the declarations of Slobodan Petrovic, who
 18 identifies himself as FKM’s director, and Miroslav Nestorovic, who identifies himself as an
 19 “official FIFA soccer agent.” TAC Ex. XIX (ECF No. 89-21). Mr. Petrovic states that he “was
 20 calling by phone, on several occasions, different offices of Google Inc., Apple Inc., Amazon Inc.,
 21 Samsung Inc. etc., informing officials to whom I was referred about the fact that their companies
 22 were using the trademark and format of Free Kick Master without authorization.” *Id.* at 2. He
 23 states that “[a]fter quite a few” phone calls, FKM contacted Samsung via counsel on March 9,
 24 2011. *Id.*; *see also* TAC Ex. XX (ECF No. 89-22) (March 9, 2011 Letter from Mr. Pesante to
 25 Samsung). Mr. Nestorovic declares that he was making such calls “together with Mr. Slobodan
 26 Petrovic.” TAC Ex. XIX (ECF No. 89-21) at 4.

27
 28 ⁴ See <https://www.apple.com/legal/contact/>.

These declarations are too vague in several key respects to plausibly infer that Apple knew third parties were infringing plaintiffs' trademarks. First, they are too vague as to *when* Apple allegedly received notice—Mr. Petrovic does not provide a date of these calls except that they occurred before plaintiffs contacted Samsung's counsel on March 9, 2011; Mr. Nestorovic also does not provide a date, but states that he was calling with Mr. Petrovic. *Id.* Second, they are vague as to *who* Mr. Petrovic and Mr. Nestorovic allegedly contacted—they fail to identify any number they dialed, any individual they reached, or even how they obtained any contact information. Given that Apple and codefendants are global enterprises with tens or hundreds of thousands of employees worldwide, this information is critical to determine whether Apple plausibly had notice of plaintiffs' claims. Third, and perhaps most critical, they are vague as to *what* Mr. Petrovic and Mr. Nestorovic allegedly discussed in these phone calls—neither Mr. Petrovic nor Mr. Nestorovic states, for example, that he identified the allegedly infringing apps in these calls. The TAC and the two statements amount to nothing more than an allegation that plaintiffs gave notice of something to someone at Apple at some time prior to March 2011. Such an allegation does not plead facts; instead, it is a mere elaboration on the element of notice. That allegation should be rejected as failing *Iqbal*'s plausibility standard. Count III should be dismissed with prejudice.

D. All Of Plaintiffs' Claims Are Time-Barred

Finally, exhibits attached to plaintiffs' TAC establish plaintiffs' knowledge of the alleged infringement before March 9, 2011, and such knowledge renders all of plaintiffs' claims time-barred. Plaintiffs attach to the TAC a letter dated March 9, 2011 from plaintiffs' counsel, Wilfredo Pesante, to Samsung. TAC Ex. XX (ECF No. 89-22). The Petrovic statement declares that Mr. Pesante's letter was sent "[a]fter quite a few telephone conversations" with Apple and the other defendants, and Mr. Nestorovic, who declares he was making these calls with Mr. Petrovic. TAC Ex. XIX (ECF No. 89-21). Plaintiffs thus acknowledge that they were aware of the allegedly infringing app before March 9, 2011, yet they delayed in commencing this action until April 15, 2015. ECF No. 1.

In view of these facts, plaintiffs' Lanham Act claims are barred by the doctrine of laches.

1 “Laches is an equitable time limitation on a party’s right to bring suit” that “rest[s] on the maxim
 2 that one who seeks the help of a court of equity must not sleep on his rights.” *Jarrow Formulas,*
 3 *Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835 (9th Cir. 2002) (quotation marks omitted). “[I]f any
 4 part of the alleged wrongful conduct occurred outside of the limitations period, courts presume
 5 that the plaintiff’s claims are barred by laches.” *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975,
 6 997 (9th Cir. 2006). The Lanham Act does not have its own statute of limitations; it borrows the
 7 most analogous statute of limitations from state law to calculate laches. *Au-Tomotive Gold Inc. v.*
 8 *Volkswagen of Am, Inc.*, 603 F.3d 1133, 1139-40 (9th Cir. 2010). Because this action was
 9 originally filed in the Northern District of Ohio, Ohio law provides the most analogous state
 10 statute of limitations. *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1046 (9th Cir. 2012)
 11 (“[W]hen a federal statute directs federal courts to borrow the most closely analogous state statute
 12 of limitations, a transferee district court must apply the state statute of limitations that the
 13 transferor district court would have applied had the case not been transferred”). It is well
 14 established that Ohio’s most analogous statute for Lanham Act claims provides a two-year
 15 limitations period. *Sherwin-Williams Co. v. Wooster Brush Co.*, No. 5:12CV03052, 2015 WL
 16 1471617, at *8 (N.D. Ohio Mar. 31, 2015); *Laukus v. Rio Brands, Inc.*, 292 F.R.D. 485, 492
 17 (N.D. Ohio 2013); *Old Tyme Remedies, LLC v. Amish Origins, LLC*, No. 5:12 CV 03044, 2015
 18 WL 1472056, at *4 (N.D. Ohio Mar. 31, 2015). Laches is thus presumed to apply unless plaintiffs
 19 commenced this action within two years after learning of the alleged infringement in 2011.
 20 Because plaintiffs commenced this action more than four years later, laches applies. Furthermore,
 21 plaintiffs recite no facts in their TAC that would rebut this presumption—they do not provide a
 22 basis for the Court to conclude that plaintiffs’ delay was reasonable or unlikely to result in
 23 prejudice to Apple and codefendants.⁵

24 Plaintiffs’ state law claims are barred by their respective statutes of limitations. Plaintiffs’
 25 § 17500 claim is subject to the three-year statute of limitations of § 338 of the California Code of

26 ⁵ If California, rather than Ohio, provided the analogous statute, laches would still apply. Courts
 27 disagree as to whether California’s analogous statute of limitations for trademark claims is two,
 28 three, or four years, see *Fitbug Ltd. v. Fitbit, Inc.*, 78 F. Supp. 3d 1180, 1190 (N.D. Cal. 2015),
 but plaintiffs’ Lanham Act claims would be untimely under each alternative.

1 Civil Procedure. *Brown v. Option One Mortg. Corp.*, 2010 WL 1267774, at *3 (N.D. Cal. Apr. 1,
2 2010). Plaintiffs' § 17200 claim is subject to a four-year statute of limitations. Cal. Bus. & Prof.
3 Code § 17208. And although courts disagree as to whether California's statute of limitations for
4 common law trademark claims is two, three, or four years, *see Fitbug*, 78 F. Supp. 3d at 1190,
5 plaintiffs' common law trademark claim is barred under all three statutes.

6 Therefore, all of plaintiffs' claims are time-barred and should be dismissed with prejudice.

7 **IV. CONCLUSION**

8 For the foregoing reasons, the Court should grant Apple's Motion to Dismiss and dismiss
9 all claims against Apple with prejudice.

10 Dated: November 23, 2015

11 By: /s/ David R. Eberhart

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